

Public Release



Public Release – Position Paper 2023.1 – April 2023

The Industry Association of Building and Property Inspectors in WA Inc – Inspect WA is pleased to announce the release of its Position Paper on: Observations for residential property buyers understanding of the Standard REIWA Residential Building Purchase Contract.

1 Background

There were a number of key issues that contributed to the release of this Position Paper:

1. Inspect WA members undertake thousands of pre purchase building inspections for WA residential property buyers every year.
2. Many property buyers are often surprised in relation to the limitations contained within the standard REIWA Contract for Sale of land or Strata title by Offer and acceptance (“REIWA Contract”) contract, generally once they become aware of those limitations.
3. Given volume of discussions Inspect WA members have with property buyers on this issue, Inspect WA thought it appropriate to provide observations which may be useful to WA residential property buyers.
4. Inspect WA acknowledges that:
 - a. The standard REIWA Contract successfully facilitates thousands of property transaction each year. Many of these transactions are progressed on the REIWA Contract contracts without issue.
 - b. The standard REIWA Contract when combined with the various Standard REIWA Annexures and the REIWA/Law Society Joint Form of General Conditions are extremely complex. Most residential property buyers do not understand the inherent complexity of these documents and rarely engage independent legal advice, especially prior to signing the contract documents.
 - c. The standard documents can be made far more complex when Agents depart from the REIWA Recommended Annexures and produce their own Annexures which can materially impact the position of the buyer, seller or both.
 - d. WA has a unique position where often the Listing Agent, who primarily represents the Seller, prepares or guides the Buyer in the preparation and execution of the Offer Contract on behalf of the Buyer, while also having a potentially a substantial financial interest in the outcome of the Contract. There is potential for conflicts.

2 Understanding the Reality of the REIWA Contract

2.1 Using the Standard REIWA Offer to Purchase Contract

1. A residential property buyer will generally make an Offer to purchase a residential property using the REIWA Contract with a limited understanding of the property with viewing often limited to on one or two occasions. While the aesthetics, layout and surface condition of the property are often the priority during these property inspections. Rarely are detailed inspections undertaken at this early stage. Many Agents will not facilitate or allow inspections to be undertaken prior to the buyer making a formal Offer.

2.2 Buying as is where is – irrespective of the condition

1. Where a Standard REIWA offer is made to purchase the property, without any Annexures or conditions and that offer is accepted by the Seller, the Buyer has essentially offered to purchase the property on an as is where is basis irrespective of the condition of that property. Buyer Beware!
2. Given there are no annexures in this scenario, a pre settlement inspection has substantial limitations. In essence, all a buyer can do during a pre settlement inspection is confirm that the property is in the same condition as it was when the offer was made. Given it is exceptionally rare for a buyer to document the condition of the property at the time when an offer is made, it might be very difficult for the buyer to present an argument that the property is not in the same condition at the time of a pre settlement inspection as it was when the offer was made. Even if they can show that the condition has changed, the standard REIWA contract may not provide the buyer with any rights to have it rectified prior to settlement.
3. An observation is that Buyers need to clearly understand that they are buying the property as is where is. If this is not acceptable to the Buyer, then the Buyer must ensure that suitable conditions are added into the Contract.

2.3 Building Approvals

1. Property owners are required to obtain council building approvals for most structures (improvements) constructed or altered on a property (there are some exemptions). The reality of the standard REIWA contract is the Seller is not required to provide any warranties or representation that building permits were obtained for all improvements on the site. What makes this even more challenging is that the Buyer is not able to obtain copies of prior building permits from the local council themselves, as this information will generally only be released to the property owner.
2. Where there are unauthorised structures on a purchased property, a buyer may be required to obtain retrospective approvals for those structures post acquisition. Retrospective approvals may require modifications, alterations or removal of structures to ensure the structures can comply with Building Code requirements at the time of the application for retrospective approval is requested. Again, the Buyer rights under the contract are mostly limited to post-settlement claims, rather than pre-settlement rectification.
3. An observation is that Buyers should ensure a clause is added to the Contract whereby the Seller Warrants that based on available information all improvements on the property have been undertaken under Building Permits issued by the relevant authority, where required. Further the Sellers authorise the Relevant Authority to release any Building Permit documentation to the Buyer when requested. Refer Appendix 1.

4. An optimal position would be a condition that requires the seller to provide copies of all relevant Building Permits or other approval documents, but commercially, sellers may not be prepared to undertake this, particularly if they do not have the documents readily at hand or didn't carry out works to the property themselves.

2.4 Pre-Purchase Building Inspections

1. Many Agents will by default, or otherwise if requested, incorporate into the Buyers Offer on a REIWA Contract a REIWA Standard Pre-Purchase Inspection for Major Structural Defects Annexure ("REIWA Building Inspection Annexure"). This entitles the Buyer to obtain a Pre-Purchase Building inspection to determine, based on a visual inspection, if any major structural defects can be identified on the residential building.
2. The REIWA Annexure is better than nothing. However, reading the fine print in the Annexure reveals that the Annexure contains an extensive exclusion such that the building inspection will only generally cover circa 15 – 25% of a property. Exclusions included:
 - Any structure beyond the residential building (unless the Annexure is physically amended)
 - Non-structural building elements including roof covers, ceilings, windows doors and non-structural walls
 - Areas that cannot be or accessed and any invasive inspection.
 - Subsequent inspections where recommended by the original inspection
3. While many Buildings inspectors will conduct a broader building inspection than that strictly required by the REIWA Annexure, there are some Agents who will refuse access to the property for anything other than the inspection described by the REIWA Annexure.
4. The REIWA Standard Pre-Purchase Inspection for Major Structural Defects Annexure has a very specific sequence of events that must be followed if a Major Structural Defect is identified within a Pre Purchase Building Inspection report to preserve the Buyers rights. It is critical that Buyers follow these requirements exactly, otherwise contractual protections can be lost. The time frames set out are relatively short, which also means the opportunity for Buyers to take advice on the report and the annexure is limited.
5. Even if the Seller agrees to carry out rectification works, the REIWA Annexure provides for a delay to the Settlement Date while those works are carried out. This delay can extend for significant periods of time, which creates problems for parties who are selling their house to purchase this one – the delays can make the chain of contracts unworkable.
6. Further, as the scope of the Annexure is limited to structural defects, non-structural items do not give rise to any rights on the part of the Buyer – even if the cost to rectify the non-structural defects is significant.
7. An observation is that there are options to the REIWA Building Inspection Annexure which Inspect WA has detailed in an number of Position Papers. Including:

- Position Paper 03.2019 – October 2019 Pre Purchase Building Inspection Report. See [Link](#)
- Position Paper 2019.13 – December 2019 Pre Purchase Inspection Report Summary Tables See [Link](#)
- Position Paper 15.2020 – April 2020 Structural Defect Notices Tables See [Link](#)
- Position Paper 19.2020 - August 2020 - Residential Pre Purchase Structural Building Inspections. Are they an adequate Due Diligence Report? See [Link](#)
- Position Paper 05.2021 - Pre-Purchase Building Inspection and its Supporting Annexure. See [Link](#)

2.5 Pest Inspections

1. Many Agents will by default, or otherwise if requested, incorporate into the Buyers Offer on a REIWA Contract a REIWA Standard Pre-Purchase Inspection for Termites Annexure (“REIWA Building Termite Annexure”). This entitles the Buyer to obtain a non-invasive written Pre-Purchase Termite inspection to determine, based on a visual inspection, if any major Termite Pest activity or Damage that can be identified on the residential building.
2. The majority of REIWA Agents will not facilitate a pre offer termite inspection.
3. The REIWA Annexure is better than nothing. However, reading the fine print in the Annexure reveals that the Annexure contains some key issues that Buyers need to be aware:
 - a. The inspections is a visual non invasive inspection. Often the true extent of termite damage will require an invasive inspection and this is excluded from the inspection and possibly the remediation.
 - b. The inspection excludes any activity or damage beyond the residential building (unless the Annexure is physically amended).
 - c. The REIWA Annexure refers to any termite damage, however, the Annexure also refers to a Major Structural Defects Notice. This is potentially problematic as there is no other Reference to Major Structural Defects in the Annexure and hence could imply the Seller is only required to fix structural elements.
 - d. The Annexure refers:
 - i. The Settlement Date will be delayed until the later of:
 1. (a) Three business days after the Sellers work is completed as certified by the Sellers:
 - a. Builder in relation to the Repair
 - b. Consultant in relation to the Eradication of the later of both of them if both are required
 - i. The inspection is non-invasive. Hence, it might be argued that remediation only has to be undertaken on the damage that can be seen. There are multiple examples where the majority of damage may not be able to be seen until an invasive inspection is undertaken.
 - ii. Treating a termite infestation may take several months and multiple treatments. A single treatment may not be sufficient to resolve the

issue especially if the primary nest is located some distance from the residential building.

4. The REIWA Standard Pre-Purchase Inspections for Termite Pest has a very specific sequence of events that must be followed if Termite infestation is identified within a Pre Purchase Building termite Inspection report to preserve the Buyers rights. It is critical that Buyers follow these requirements exactly, otherwise contractual protections can be lost.
5. An observation is that where a major termite infestation is identified it might be more equitable for the buyer to simply be given the opportunity to terminate the contract as it can be argued that the remedies propose by the Standard REIWA Pest Annexure do not provide the Buyer adequate protection in all situations. Refer Appendix Two.

2.6 Working Order Clauses

1. As identified the REIWA Contract facilitates an, as is where is, sale contract. To combat the limitations Buyers or Agents will on occasion add a Working Order clause to the REIWA contract. While the concept is generally understood the complexity will often cause these clauses to fail. Some observations:

- a. Working Order

What does working order mean? As new working order, fair working order given its age, still does the jobs but is substantially worn?

- b. How do you determine Working Order?

How do you determine the working order? How do you resolve differences of opinion? Do you engaged third parties to determine Working Order? What about the limits on the number of people who can attend the Pre-Settlement Inspection?

- c. What's included

What is exactly is covered by the clause and what is excluded? Is it simple?

- i. Electrical

- a. Electrical appliances (ovens, grills, stoves, dryers, dishwashers, coffee machines, micro waves, fridges, freezers,
 - b. Air Conditioners and Evaporative Air Coolers
 - c. Exhaust fans and ceiling fans
 - d. Intercoms, alarms, CCTV
 - e. Ducted vacuum system
 - f. Spas pools and associated equipment
 - g. Entry gates and garage doors
 - h. Lifts, car stacker's
 - i. GPO's lights wiring, smart wiring, internet cabling, NBN equipment
 - j. BBQ's and outdoor kitchens
 - k. Smoke alarms and RCD's
 - l. Remote controls
 - m. Wiring, Meter Boards

- ii. Plumbing and Gas

- a. Taps, toilets, bidets, baths, shower heads
 - b. Grey and Black water drains
 - c. Storm water drains
 - d. Gas bayonets
 - e. Hot water systems
 - f. Water filters, chillers, sparkling water supplies
 - g. Vent pipes
 - iii. Reticulation
 - a. Controllers, Solenoids
 - b. Bores
 - c. Sprinklers
 - iv. Building
 - a. Doors including locks and keys
 - b. Windows including locks and keys
 - c. Flyscreens
 - d. Chimneys
 - e. Council bins
- d. If it can be established that the item does not meet the working definition (as defined and agreed) and this is only established 2 days prior to settlement?
- i. Do you just attempt to negotiate an agreement amount? What if you cannot agree an amount?
 - ii. Can you defer settlement – what are the impacts or penalties. What if there are multiple Settlements all contingent on each other?
 - iii. Can you withhold monies if so how do you determine the amount?
 - iv. If monies are withheld who holds and releases the monies?
2. Because these clauses are not drafted by REIWA, or provided in a standard annexure, there is a lack of consistency in drafting, which leads to a greater risk of disagreement between buyer and seller.
3. An observation is that a residential building may have literally thousands of working parts that need to be in good working order. However, individually these working items could represent a rounding number in the context of the overall valuation of the property. Conversely some items could cost several thousands of dollars to remediate if the items is not in good working order. Inspect WA's observation is that while Working Order clauses appears to be a good idea, the devil will be in the detail Given the complexity of the issues, we suggest a situation as per Appendix 3 be considered.

3 The Associations position is

1. WA is fortunate that the process to purchase a property can be viewed as relatively straight forward when compared with other jurisdictions across Australia. Thousands of property transactions are conducted annually with very little issue.

2. While the process appears “simple”, the REIWA Contract, the REIWA Annexures and the REIWA Joint Form of General Conditions are extremely complex. Buyers should consider obtaining independent legal advice prior to entry into a contract.
3. The REIWA Contract is essentially an offer to purchase on an as is where is basis. Buyer beware! Given the risks Contract Annexures (Conditions) to the contract can be added. These have the potential to reduce risks but there will always be residual risks. Observations have been provided.
4. Keep it in perspective. Purchasing a second-hand property will have risks. Eliminating the residual risks many cost more than the potential risks.
5. Inspect WA’s goal is simply to bring to the attention of Property Buyers some of the inherent and residual risks associated with the use of the Standard REIWA documentation.

Disclaimer

This document was considered accurate at the time of release. RIEWA Contracts and Annexes are subject to constant change as is the general commercial environment. Inspect WA recommends readers to this document obtain independent Legal Advice.

Committee

Inspect WA

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4 Appendix 1. Clause for Building Permits and Authority to Access.

4.1 Sellers Warranties in relation to Building Approvals.

The Seller warrants to the best of their knowledge and based on written inquiries to the local (Council, Shire or City as applicable) “relevant authority” that all improvements on the property were undertaken under Building Permits (issued by the relevant authority) where required.

Further, the Seller authorises the relevant authority to release copies of all historical Building Permits to the Buyer.

Where it can be demonstrated that Building Permits for improvements have not been issued and the Seller did not disclose the issue prior to entry into the Contract, the Buyers can terminate the contract within 20 Business Days of Acceptance or 5 Business Days from receipt of confirmation from the relevant authority to the effect that the Building Permits were not issued.

5 Appendix Clause 2. REIWA Pest Inspection

5.1.1 Recommended Key Changes to the REIWA Building Termite Annexure

- Remove reference to Major Structural Defects under 9.2
- Eradication to involve the seller entering into contract to undertake all necessary eradication work and treatment over a 12 month period as required, at the seller's cost.
- Introduce new clause which states that if termite infestation is identified on the residential building the Buyer to has the right to terminate the contract within 10 Business Days of receipt of the report.

6 Appendix 3. Good Working Order Annexure

6.1 Seller Warranties in relation to same condition

The Seller warrants to the best of their knowledge that at the time of the Pre-Settlement Inspection and at Settlement, that the property is substantially in the same condition that existed at the date of the Contract.

6.2 Sellers Warranties in relation to operating components of the Residential Building

The Seller warrants that to the best of their knowledge that at the time of the Pre-Settlement Inspection and at Settlement, all of the items listed below (where they exist) are in Good Working Order except for the items specifically listed as Excluded items.

Good Working Order defined as – Item still works or operates as per the intended function having regard to its age.

6.3 Excluded Items

The following items are excluded from the Sellers Warranties due to known or suspected issues and hence may not be in good working order at Settlement

- a.
- b.
- c.

6.4 Items to be in good working order

The Seller believes the following items will be in good working order at Settlement

- a. Electrical
 - a. Electrical appliances (ovens, grills, stoves, dryers, dishwashers, coffee machines, microwaves, fridges, freezers) where included
 - b. Air Conditioners and Evaporative Air Coolers
 - c. Exhaust fans, rangehoods and ceiling fans
 - d. Intercoms, alarms, CCTV
 - e. Ducted vacuum system

- f. Spas pools and associated equipment including automated cleaning equipment
 - g. Entry gates, garage doors including any associated automation
 - h. Lifts, car stacker's
 - i. GPO's lights wiring, smart wiring, internet cabling, NBN equipment
 - j. BBQ's and outdoor kitchens
 - k. Smoke alarms and RCD's
 - l. Remote controls
 - m. Wiring, Meter Boards
- b. Plumbing and Gas
 - a. Taps, toilets, bidets, baths, shower heads
 - b. Grey and Black water drains
 - c. Storm water drains
 - d. Gas bayonets
 - e. Hot water systems
 - f. Water filters, chillers, sparkling water supplies
 - g. Vent pipes
 - h. Septic tanks and or secondary treatment systems or aerated wastewater treatment systems
- c. Reticulation
 - a. Controllers, Solenoids
 - b. Bores
 - c. Sprinklers
- d. Building
 - a. Doors including locks and keys
 - b. Windows including locks and keys
 - c. Flyscreens
 - d. Chimneys
 - e. Council bins
 - f. Pool and or spa fencing and or barriers
- e. Other items
 - a.
 - b.

NB: Where the property is a Strata property, the above list is limited to the items which are attributed solely to the Strata Lot and excludes all Strata Common property.

6.5 Items that are not in Good Working Order

The Buyer is expressly granted the right to undertake an inspection under clause 5.1 of the General Conditions. Where it is found that an item is not in good working order at the time of the Pre Settlement inspection:

1. The Buyer must provide a notice on the day of the Pre-Settlement Inspection that an item is not in good working order and what evidence can be provided to support the claim.

2. The Seller is afforded the opportunity to have the item repaired within 24 hours and the Buyer is afforded the opportunity to reinspect the item again prior to Settlement.
3. If the Seller cannot repair the item prior to settlement, settlement the Buyer can have the item repaired by an independent unrelated third party after settlement is completed, and the Sellers warrant that they will pay the associated costs of any such repair. Any financial claim by the Buyer to the Seller must be supported by a detailed quote and receipt. Settlement does not waive the Buyer's rights under this clause.